



European administration of consular protection

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Abstract

This paper seeks to review the evolution of consular protection management in the European Union. The process of Europeanisation has reached its current profile through three stages of evolution and we are likely to see further institutionalisation, with several available alternatives. The historical analysis outlines the rationale for a further process of Europeanisation in the light of changes in the legislative powers of the EU, exploring the nature of legal regulatedness and aligning it with the development of fundamental rights, and presents a prognosis for the next stage of development in the light of experience to date. The research findings, based on an analysis of normative rules of various origins, regulatory and binding, preparatory documents, official statistics and reports as primary sources, and literature on specific aspects of the subject, also suggest that an effective consular protection policy will require changes in the tasks and competences in the next development stage. The existing consular enforcement apparatus in the Member States should be better integrated with the network of EU delegations, at least for some of the specified consular protection tasks. This raises further regulatory issues, but it is undeniable that the Europeanisation of consular protection administration is moving in this direction.

Keywords

consular protection, Europeanisation, European administration, emergency travel document, EU citizen.

The history of the consul as a legal instrument reveals a highly diverse picture, but cooperation between different actors under different jurisdictions has always been a key element in the performance of its tasks (Csatlós, 2019a, 47–48). In the modern era, consular administration has traditionally been an administrative field strongly linked to the state's external relations and external policy. In the course of performing consular functions, numerous legal relationships intersect, but their basis is always that of cooperation between states, which is increasingly influenced by the European Union: consular protection of unrepresented EU citizens in third states is a fundamental right,¹ and, as a result, the provisions of the directive now have greater

¹ The Charter of Fundamental Rights of the European Union. OJ C 326 26.10.2012. p. 391–407. [hereinafter: Charter of Fundamental Rights], Article 46.

material, procedural and organisational impact on national consular administration than earlier. The consular protection policy, initially regulated under the aegis of governmental publicity, has now been incorporated into the complex, multi-level organisation of European public administration (Csatlós, 2021c, 45–46), but the process of development of the legal institution is far from being complete. The field is becoming so Europeanised (i.e. EU law is interweaving national consular administration) in such a way that there is in fact no direct mandate. While, as a rule, there is no harmonisation of substantive law, it is the legislation, now in the form of a directive, that ensures coordination and cooperation between the European administrative bodies involved indirectly and, especially in a crisis, directly in the tasks and powers of consular protection policy, which, due to its personal scope, ensures the exercise and enforceability of fundamental rights. This links to the organisational background in the procedural field, and the emergence of a common legal instrument, namely the EU emergency travel document, and the development of the legal framework surrounding it are developing in such a way that the next reform phase could lead to institutional changes, parallel with the appreciation of the EU delegations. This could be a further argument for the necessity of a single set of European procedural rules, not only in terms of client guarantees, but also for the further development of a predictable, transparent EU administration.

1. Consular protection as a public task: framework for implementation

Consular protection covers the assistance provided by the State to its own nationals abroad and, less frequently, to nationals of other countries,² in certain life situations that make them vulnerable: these are mainly official acts and other service tasks performed by a consular officer. In Hungary, the Fundamental Law, like the Constitution, stipulates that every Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad.³ This is a generally recognised premise of inter-state relations based on customary law that personal sovereignty, or rather protection, follows the citizen abroad in this respect (O'Brien, 2001, 313). Its exercise requires the consent of the host state: the functions that may be performed there by a consular officer of the sending state are always the subject of an agreement between the sending and the host state (Csarada, 1901, 251; Teghze, 1930, 295); the Vienna Convention on Consular Relations only names the typical, customarily recognised consular functions.⁴ This means that a consular officer of one state may be permitted to do something on the territory of one state, while a consul accredited to another state does not have such powers there. The consular officer is obliged to respect not only the internal legal rules of the sending State but also those of the receiving State. This framework can be filled by the sending state with tasks and powers for the consular officer, the so-called consular law, which is part of national law. The consular authority can carry out its tasks in the territory of a foreign State within the framework of public international law, but within the limits set by its national law and within the limits of the national law of the host State, and, because of the specific nature of its organisation and activities, in practice by relying on relations with other bodies. These

² Vienna Convention on Consular Relations. Vienna, 24 April 1963. United Nations, Treaty Series, vol. 596, p. 261, Article 8 (promulgated in Hungary by Decree-Law No 13 of 1987, the Vienna Convention): “*Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.*”

³ Article XXVII of the Fundamental Law of Hungary. cf. § 69 (3) of the Constitution of the Republic of Hungary

⁴ Article 5 of the Vienna Convention.

legally regulated relationships, governed by various legal rules, can be summarised as “cooperative relationships”, which are based on a system of relations between the bodies concerned, primarily in order to establish or implement a relationship of authority or service between the consular authority and the citizen. The legal relationships in the field of consular administration may be diverse in nature, but they have in common that the rights and obligations of the parties in this type of administrative relationship are therefore not simply determined by administrative law, but by a body of pieces of legislation, so that the rights and obligations of the entities involved in the performance of the task and the applicable law depend on the nature of the relationship.

Consular representation is a *branch of public administration seconded abroad*; its purpose is, inter alia, to ensure that the domestic administration is accessible to the citizen abroad and to protect the interests of the citizen in the host State by means of personal sovereignty. As a *public* task, administrative law is its most important source of law, based on and influenced by international law. *The consular authority can carry out its tasks in the territory of a foreign State within the framework of public international law, but within the limits set by its national law and within the limits of the national law of the host State, and, because of the specific nature of its organisation and activities, in practice by relying on relations with other bodies.*⁵

In carrying out its consular protection tasks, which may be official and non-official, the consular authority cooperates in this public international law framework, in principle:

- a) with the authorities and other bodies of the host State: these are coordinate relations, the content of which is determined by public international law and the law of the host State over the law of the sending State;
- b) with the consular authorities of another State and as determined by international law, in particular when contact is made in the case of a national of that State;⁶ and
- c) with the authorities and bodies of its own sending state, with the latter both in relations of control and supervision (hierarchical) and in relations of cooperation based on the interdependence of each other’s activities in the performance of tasks (Csatlós, 2017, 35–40).

While diplomatic missions are meant to liaise with the central authorities of the host state, consular missions tend to cooperate with local authorities of the host state competent in the consular district, in exceptional cases outside the consular district, in the context of consular tasks. The competent central authorities of the host State will be consulted only when and to the extent permitted by the laws, other legislation and customs of the host State or international agreements concluded in this regard. The basis of the legal relationship of cooperation between authorities and the trigger for further legal relationships is most often the obligation of notification as a legal fact by the host State. In certain situations affecting nationals of the sending State, the authorities of the receiving State are obliged to notify the consular service of the sending

⁵ All this, together with the two sets of norms of national law and international law, is what *Lorenz von Stein* called *international administrative law*, while *Donato Donati* reserved this concept for the broad field of administrative matters of international organisations. He referred to the activities of public authorities, which are filled with national law but take place within the framework of public international law, as *international administrative law*. On the normative background to the implementation of consular protection, aside from the naming issues, see: Vogel (1986, p. 3–4); Csatlós (2019, p. 49).

⁶ cf. Articles 7 and 8 of the Vienna Convention, and the entire EU consular protection policy is based on this theorem.

State,⁷ but there may also be cases where the consular officer, in providing consular protection, approaches a body or authority, for example in connection with legal aid cases.⁸

Consular representations are foreign public administrations which are incorporated into the system of domestic administrative organisation⁹ on the basis of national law, in a supremacy relationship. Consulates usually function as the (main) consular department of the diplomatic mission and, regardless of their geographical location in the host state (even in several places, since unlike a diplomatic mission, a consular office may be located in several places, or even in a neighbouring state where there is no diplomatic mission but consular administration is intended to be provided) they are under the direct control of a diplomatic mission (Csatlós, 2020, 168–169, 174). In the context of *performance of tasks*, the consular officer has autonomous tasks and powers in certain matters, while in other cases he typically functions as an intermediate authority, thus establishing a link between the client and the administration of the home state: transmits an application or performs a specific procedural act, which is what distinguishes it from a simple referral. It is subject to national regulation as to which cases it can act in this capacity and what procedural powers it holds (Csatlós, 2020, 163–165).

There is no uniform content of consular protection, it varies from state to state what is provided under this heading to the category of persons (national, resident, domiciled, resident) it intends to protect. The palette is colourful, as is the nature of the activities they manifest in: official case, action, advice, and therefore it depends on the sending and receiving States and an individual case what legal relationships intersect each other.¹⁰ In many cases, these legal relationships cannot be separated from one another, but are interdependent and overlap.

⁷ See also: LaGrand (Germany v. United States of America) Judgment, I.C.J. Reports 2001, p. 466, paragraphs 123–125.

⁸ Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. [Promulgated in Hungary by: Act XXXVI of 2005] Sections 8, 9, and 21. Hungary has made the following reservation to the Convention (Article 3): “Hungary is against the direct service of documents on its territory by diplomatic or consular representatives of foreign states, unless the addressee is a national of the sending state of the diplomatic or consular representative. Documents to be served through consular channels shall be received by the Ministry of Justice.” (Csatlós, 2019, 55–56).

⁹ An atypical case is cooperation with an Honorary Consul. The institution of Honorary Consul is well known and generally accepted in many countries of the world, mainly because of the financial burden of a professional consular officer. The role of the honorary consul is defined by the sending state, which is narrower than that of a professional consul and sometimes only symbolic: he is therefore effectively subordinate to the diplomatic mission responsible for the territory and, in the case of a professional consular officer, their powers must be coordinated on the basis of an organisational hierarchy and an administrative relationship of supremacy. The Honorary Consul mainly provides assistance, information and transmission of documents, but does not typically have any official powers. Their action in official proceedings may therefore at most give rise to a relationship of cooperation with the authorities of the host State or, depending on the law of the host State, they may act as a representative for the purpose of defending the interests of the nationals, and therefore they are not entitled to take procedural steps. Cf. Vienna Convention, Chapter 3; Csatlós (2019, p. 56–57). See also: Dela (2014, 71), Stringer (2007, 5–12).

¹⁰ Cf. Recital (5) of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, OJ L 106, 24.4.2015. p. 1–13, hereinafter Council Directive (EU) 2015/637. The picture is also very diverse across EU Member States as to the level and way in which consular protection is regulated, based on surveys conducted in 2010: Faro & Moraru (2010, 609, 611–613), cf. Schweighofer (2012, 94), Csatlós (2019, 84).

2. The Europeanisation of consular protection management – step by step

2.1. First phase: the intergovernmental nature of the common policy

The EU consular protection policy was born with the Maastricht Treaty of 1992 as the EU citizens' *right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State*.¹¹ It may not follow clearly from this, but it does follow from all the legal acts that have been adopted since then invoking the provision as a legal basis, that it covers consular protection and consular functions,¹² mainly in typical life situations.¹³ At the first stage, the implementation of the policy did not go beyond the *intergovernmental cooperation nature* of the second pillar (common foreign and security policy) and its instruments: the Treaty provision called on the Member States to adopt the necessary provisions among themselves and to enter into international negotiations to provide protection.¹⁴

At that time, without any harmonisation of consular law, the Member States' diplomatic missions and consular posts were still carrying out their tasks independently,¹⁵ with maximum respect for the Member States' external relations.¹⁶ The details of the assistance to be provided in specific circumstances were not regulated and the relationship between the consular authority and the national authorities was based on *guidelines*.¹⁷ As such, the legal relationship was not regulated by a legal act; cooperation went just beyond the characteristics of classical intergovernmental relations and was in practice based on the autonomous performance of tasks at the level of the indirect administration. Although in the form of *guidelines*, the voluntary lead State

¹¹ Treaty on European Union. OJ C 191, 29.7.1992 1–112. Article 8c [hereinafter referred to as the Maastricht Treaty].

¹² It is also recognised in international law where consular functions are carried out by a diplomatic mission. See. Vienna Convention on Diplomatic Relations. Vienna, 18 April 1961. United Nations, Treaty Series, vol. 500, p. 95. [Promulgated in Hungary by: Decree-Law No. 22 of 1965] Articles 3(2) and 70.

¹³ Decision of the Representatives of the Governments of the Member States Meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ L 314, 28.12.1995. 73–76, Article 5 (1). The protection referred to in Article 1 shall comprise: (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union. (2) In addition, Member States' diplomatic representations or consular agents serving in a non-member State may, insofar as it is within their powers, also come to the assistance of any citizen of the Union who so requests in other circumstances.

¹⁴ Maastricht Treaty, Article 8c, last sentence.

¹⁵ As is typical of the European Administrative Area, the EU institutions do not have their own executive apparatus in the Member States; it is the national administrations that function as such (Torma, 2011, 197).

¹⁶ cf. Hideg (2019, 73).

¹⁷ Guidelines for further implementing a number of provisions under Decision 95/553/EC. PESC 833 COCON 10 11113/08. Brussels, 24 June 2008.; Guidelines on Consular Protection of EU Citizens in Third Countries. 10109/2/06 REV 2 PESC 534 COCON 14. Brussels, 5 November 2010.; Guidelines on Consular Protection of EU Citizens in Third Countries. PESC 534 COCON 14 10109/2/06 REV 2. Brussels, 16 June 2006.; Guidelines on Consular Protection of EU Citizens in Third Countries. COCON 40 PESC 1371 15613/10. Brussels, 5 November 2010.

role is regulated as a framework wherein several Member States are represented.¹⁸ However, the introduction of a simplified type of emergency travel document to help EU citizens who have lost their travel document in a third country or whose travel document has expired during their stay has not brought any significant change in the organisation, procedure or substance of consular administration in the Member States.¹⁹

2.2. Second phase: integration into the European administrative system

The Lisbon Treaty has completely redefined, directly and indirectly, the EU's consular protection policy by seeking to overcome the limits of intergovernmental cooperation. While continuing to respect the external autonomy of the Member States in this regard and the fact that each Member State is in principle responsible for the consular protection of its own nationals,²⁰ and without aiming at any further harmonisation of substantive law, the Council of the European Union was granted the right to regulate the necessary coordination and cooperation measures by means of a directive, in the framework of a consultation procedure.²¹ As for the task, the obligation is not in fact to provide the same level of consular protection, but, *analysing the wording of the relevant provisions and preparatory documents, and exploring the objective of the legislator*, to ensure, in accordance with national law, equal treatment with their own nationals, in particular in certain qualified situations. On this basis, Council Directive 2015/637, adopted as a result of a multiannual procedure to prepare the reform of the previous Decision, created a mechanism for cooperation and a *procedural regime* for the requirement of equal treatment between the authorities and bodies of the Member States with consular responsibilities in general and in explicit crisis situations.²² The provisions aim at establishing a link between the representation on the spot of the EU Member State and the EU citizen. Concrete consular action by the requested Member State's diplomatic mission or consular post, which is foreign by nationality but represented in the place where the problem arises, will only be taken under its own consular law²³ if the home state is unable or unwilling to act on the matter.²⁴ It should be underlined that a procedural obligation also arises under the Directive if the Member State (diplomatic mission or consular post) becomes aware that an unrepresented citizen has been placed in an emergency situation, such as those listed in Article 9.²⁵ While the Directive still does not provide for uniform consular assistance, it is an improvement in terms of efficien-

¹⁸ European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) OJ C 317 12.12.2008.

¹⁹ Decision of the representatives of the governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document OJ L 168, 6.7.1996 4–11.

²⁰ Council Directive (EU) 2015/637, Recital (6); Article 2.

²¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007, p. 1–229 Point 36.

²² Council Directive (EU) 2015/637 Article 10 cf. Article 13.

²³ According to Article 20(2)(c) TFEU and Article 23 TFEU, Member States must provide consular protection to unrepresented citizens under the same conditions as to their own nationals. Within this framework, the preamble to Council Directive (EU) 2015/637 states in recital (5) that the Directive does not affect Member States' competence to determine the scope of the protection to be provided to their own nationals.

²⁴ cf. Council Directive (EU) 2015/637, Article 3

²⁵ Council Directive (EU) 2015/637, Article 10(2).

cy to require that, where the State acting on the spot provides assistance to the accompanying family member of a non-EU national in the case of its own national, it should also do so to the non-EU national who requests assistance and to the accompanying family member of the non-EU national.²⁶ This is also likely to be based on the concept of family member under national law, interpreted in the light of the concept of family member in EU law, and obviously where there are no other obstacles to it, such as foreign policy.²⁷ Providing the same service under the same conditions, resulting from different national legislation, does not imply equal treatment, as recognised in the preamble of EU Directive 2015/637 itself: “*Member States might not be in a position to deliver certain types of consular protection, such as emergency travel documents, to third-country family members*”.²⁸

The crisis procedures of the new regulation also take into account and involve the direct administrative structure of the EU, both through the possibility to activate the EU Civilian Crisis Management Mechanism and by using the *European External Action Service* (EEAS). The EEAS has no powers for an autonomous consular role, but *may* have powers to support the coordination of consular tasks carried out by Member States’ missions in the event of a crisis,²⁹ and also enjoys the support of approximately 150 delegations representing the EU in third countries and international organisations, if requested by Member States.³⁰ The EU law does not place delegations and Member States’ diplomatic missions and consular posts in a hierarchical relationship, and their role is complementary. In such situations, the framework for the legal relationship between the different bodies is given, but the content is *ad hoc*, as for example in the event of a mass consular protection need there is no predefined set of responsibilities for organisational

²⁶ Council Directive 2015/637/EC, Article 5.

²⁷ Summary table of the conditions under which Member States provide consular protection to family members of non-EU citizens, according to 2010 data: Csatlós (2019, 127–129). Hungarian consular law, for example, repeats the above provision on family members in its implementing rules, but the word family member is otherwise only used in the common forms for the costs of consular protection, otherwise it is used in conjunction with the Consular Protection Act to refer to relatives and close relatives under the Civil Code. The consular service shall provide consular protection to a family member who is not himself an EU citizen and who is accompanied by an EU citizen unrepresented in a third country, to the same extent and under the same conditions as it would provide in the case of a non-EU citizen family member of a Hungarian citizen, in accordance with its internal legislation or practice. Beyond that, the scope of consular protection may be extended on the basis of a case-by-case agreement concluded at the specific request of the consular authority of the Member State, provided that this does not infringe the requirements of national and EU law. See Section 14/B (5) of Foreign Minister’s Decree 17/2001 (XI. 15.) on the detailed rules of consular protection, and Section 20 (2) of Act XLVI of 2001 on Consular Protection.

²⁸ Council Directive (EU) 2015/637, recital (9). See in this context: Emergency Travel Document (ETD) - Presidency reflection paper. COCON 14, CFSP/PESC 523, COTRA 13, 11955/15, Brussels, 17 September 2015. 9. According to this, eight Member States issue several types of emergency travel documents, nine use a paper format, three use a booklet format and three use a paper *laissez-passer*, while one Member State uses it in booklet format, seven Member States issue a paper format as temporary passport, and two Member States issue a paper format travel document as emergency passport and six issue it in booklet format. Csatlós (2019, 94).

²⁹ Council Directive (EU) 2015/637 Article 13(3)-(4).

³⁰ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU). OJ L 201, 3.8.2010, p. 30–40, Article 5(10); Council Directive (EU) 2015/637, Article 11, see also: Articles 12 to 13

legal issues in crisis situations, and what is provided as guidance is based on a flexible willingness to help. The organisational legal relationship is *sui generis* and does not correspond to the principles governing the system of administrative organisation within the state, and loyal cooperation and solidarity are the cohesive forces that hold the system together, essentially in the context of the consular protection obligation under EU law. However, principles are no substitute for *erga omnes* organisational and liability rules, especially in the crossroads of legal relationships created at the intersection of different jurisdictions. Nevertheless, this phase of development can be seen as the real beginning of the construction of a complex European public administration. Council Directive 2015/637 builds on the exclusive consular authority role of the indirect level of administration, while at the same time the direct level of administration appears as an actor, as the background country providing the common infrastructure. Moreover, in addition to the emphasis on inter-state cooperation with third countries, the procedural regularisation of procedural acts between authorities and bodies of different Member States is a major development

In this context, it is worth mentioning the development of fundamental rights: the Charter of Fundamental Rights not only guarantees the right to consular protection, but also contains the administrative framework of the rule of law that is linked to the enforcement of this right, which is manifested, *inter alia*, in the right to good administration and the related right to effective remedy. This, in turn, presupposes proactive action on the part of the Member State, including legislation, especially where consular protection is not provided for in specific legal provisions, and thus a high degree of discretion is required. These potential law enforcement issues can primarily be approached from a theoretical perspective, as the available statistics show a low incidence of cases, which states record differently (Faro & Moraru, 2010, 597; Schweighofer, 2012, 76).

2.3. Phase three: laying the foundations for EU administrative procedural law

The task of replacing travel documents was already identified as the most common consular protection measure in the 2015 surveys,³¹ and the Commission summarised the challenges and responses to consular protection policy in its 2015-2020 report. The report states that, during this period, the Commission responded to 10 complaints, 8 letters/one-off enquiries and 8 questions from the European Parliament on this issue. Again, these mainly related to the issue of emergency travel documents for return purposes or the lack of consular protection or its discriminatory nature.³² These are to be addressed by a 2019 Directive, now adopted, namely *Council Directive 2019/997 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP*. This has paved the way for the Europeanisation of EU consular protection policy and, with it, a new phase in the development of European public

³¹ Consular Affairs Working Party Report of 16 April 2016. Consular Cooperation Initiatives – Final report presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels. 3. For more on this, see: Csatlós (2019, 92).

³² Report from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Under Article 25 TFEU Brussels, 15.12.2020. COM/2020/731 final. On progress towards effective EU citizenship 2016-2020 23.

administration. Although preparations are still underway to apply the rules,³³ the provisions provide for a leap forward in terms of Europeanisation compared to the 2015 Directive, which was a *lex generalis*.

The new directive will bring along the so-far strongest involvement of the direct level of public administration. There will still be no harmonisation of substantive law, but the creation of a new type of travel document will not only strengthen the sense of EU citizenship, but also the quasi-state character of the EU. A passport is closely linked to proof of citizenship; it is an internationally recognised document (Hargitai, 1995, 710), and therefore the right to issue passports is a matter of discretion for the state, as is the way in which it regulates the substantive and procedural rules for issuing different types of travel document (Lee, 1961, 176; Torpey, 2000, 161–162; Hagedorn, 2008, para. 7). The EU has already tried to incorporate the emergency travel document into this system, but this time with stronger instruments. The Commission has been given executive legislative powers³⁴ and a mandate³⁵ to produce a document that meets the highest possible security and technical standards in line with international ICAO standards and which can be a real alternative to a passport for the period of the holder's return. Furthermore, to ensure its acceptance, the Directive breaks with the nearly 30-year-old concept of calling on Member States to reach agreements with third countries to ensure that the EU consular protection policy is successfully applied to all EU citizens, with the Member State body being the implementing body for all related tasks on the ground.³⁶ This time, however, the EU's direct level of administration will be given more responsibilities and powers: the EEAS will forward specimens of the EU's uniform format for emergency travel documents and stamps to EU delegations in third countries. This already implies a more extensive network of missions and representations than the Member States.³⁷ The delegations will be the ones to inform the competent authorities of the relevant third countries about the use of the EU provisional travel document, its uniform format and its main security features, and will provide them with specimen examples of the uniform format and stamp of the EU provisional travel document as a reference. If there is no Union delegation in a third country, the represented Member States shall decide, in the framework of local consular cooperation, which Member State shall notify the competent authorities of that third country.³⁸ This not only strengthens the EU as a single entity and external actor, but also leads to a shift of responsibilities towards the national apparatus.³⁹

³³ The Commission will adopt implementing acts containing further technical specifications for EU emergency travel documents. Within 24 months of their adoption, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. Member States shall ultimately apply this Directive 36 months after the adoption by the Commission of its implementing acts laying down further technical specifications. Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP OJ L 163, 20.6.2019, p. 1–12. [hereinafter: Council Directive (EU) 2019/997] Articles 18–19.

³⁴ Council Directive (EU) 2019/997 Article 9.

³⁵ Council Directive (EU) 2019/997 Article 11.

³⁶ cf. Article 8 of the Vienna Convention.

³⁷ All Member States have a mission in only four third countries outside the EU: the USA, India, China and Russia, and statistically the EU has five Member States with a mission in more than half of the world's countries. See: EEAS (2022); Moraru (2021).

³⁸ Council Directive (EU) 2019/997 Article 13(2)-(3), (5).

³⁹ See in this context: Torma & Ritó (2021, 111).

A milestone in administrative procedural law is the further reflection on the cooperation procedure: the Directive creates a directly applicable *administrative procedural rule* for the cooperation stage between authorities of several Member States, from the submission of the request to the adoption of the decision; that is, for the areas of exercising functions and powers outside national law.⁴⁰ By setting a time limit for all procedural steps, it makes not only the duration of the procedure predictable, which means issuing a travel document within a maximum of 7 working days of the application if the conditions are complied with, but also the uniformity of assistance, irrespective of the forum. It thus brings the image of good administration under the democratic rule of law one step closer to the EU citizen, which is otherwise required by the EU,⁴¹ while at the same time the uniformity of assistance is fully ensured.

The role of inter-state cooperation is fading and the role of the public authority cooperation mechanism under the aegis of EU law is strengthening; its regulation is improving and the European administrative unit of consular protection is being built in parallel. The reform of the travel document was triggered by the fact that most of the consular protection provisions aimed at replacing the travel document, but the previous instrument was not fully successful, neither from a document security aspect nor in terms of general acceptance. In addition, the future introduction of a uniform procedural fee – instead of the current national law tariff, which varies widely⁴² – and the possibility of introducing an electronic emergency travel document are also on the agenda.⁴³

The system is nuanced by the fact that, while assistance for unrepresented citizens in relation to the emergency travel document must be provided at the embassy or consulate of any Member State, Directive 2015/637 allows Member States to continue to conclude practical arrangements in order to share responsibility. In such cases, Member States receiving applications for an EU emergency travel document will have to assess, on a case-by-case basis, whether it can be issued or whether the case must be referred to the embassy or consulate designated as competent under an existing agreement.⁴⁴ However, no time limit has been set for this, while it is clear that each procedural step is pushing the actual issuance of the travel document further and further away. EU law only provides that such agreements must be published by the EU and the Member States in order to ensure transparency for EU citizens.⁴⁵ So far, either there have been no such agreements or the existence of such arrangements is not indicated on the Commission's information page, which only provides a search for whether the country of origin is represented in the territory of a given third country, but does not provide any information on which Member State is represented if the country of nationality is unrepresented.⁴⁶ Obviously, there are and will be diplomatic missions and consular posts that do not and will not have the

⁴⁰ Council Directive (EU) 2019/997 Article 4.

⁴¹ More on this: Csatlós (2019b, 16–17); Csatlós (2019c); Csatlós (2021d); Csatlós (2019d).

⁴² Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009 Impact Assessment Brussels, 5.12.2007, SEC(2007) 1600. 5. Csatlós (2019a, 96).

⁴³ See: Recital 22, Articles 8, 9 and 11, 12 and Annexes I and II to Council Directive (EU) 2019/997.

⁴⁴ Council Directive (EU) 2019/997 (recital 7).

⁴⁵ Council Directive (EU) 2015/637 Article 7.

⁴⁶ See: Find an embassy/consulate. https://ec.europa.eu/consularprotection/representation-offices_en

technical conditions for issuing documents,⁴⁷ or may not have been authorised to perform this type of (official) task, and this all clouds the picture of efficiency. On the one hand, it would have been useful to set a fixed deadline for the transfer of documents, for the sake of completeness, and, on the other hand, in order to ensure that the information is complete, the website needs to become more user-friendly and provide genuine and rapid assistance in the future.⁴⁸ At present, there is neither an obligation to inform nor a referral obligation for Member States' diplomatic missions and consular posts to refer a client who has made a request to them for a consular protection measure for which they have no competence to refer the case or to inform him or her of which Member State's diplomatic mission or consular post to contact.

2.4. The next phase: the transfer of responsibilities to a direct European administrative level?

2.4.1. (Side) effects of COVID19 on consular administration

At the outbreak of the pandemic, the experience and inherent necessity of consular protection cooperation in crisis situations further reinforced the picture of a move towards the Europeanisation of consular administration. The repatriation of millions of EU citizens suddenly stranded on the territory of a third state could only be achieved with EU funding and action, with significant use of the EU Civilian Crisis Management Mechanism (and its organisational background). This resulted in the repatriation of some 600,000 EU citizens (EEAS, 2020; Csatlós, 2021a, 34–36; Csatlós, 2021b, 19–21). To deal with similar crises, to remain both organisationally and financially transparent and within the limits of legality required in other areas, and to replace the UK's executive apparatus, which is a huge external representation network that was lost due to Brexit, requires further Europeanisation, which the Commission has already begun to do at the level of identifying the intention and the problem to be solved.⁴⁹ The review of the Consular Protection Directive, which entered into force in 2018, and the way forward was due in 2021,⁵⁰ and COVID19 and Brexit have set the way forward in terms of tasks. There are difficulties in informing EU citizens about travel conditions; there is no concrete legal basis for the coordination role of delegations to deal with a crisis situation, and existing legislation is full of uncertainties regarding the (co-)financing of assistance to represented EU citizens. The rules apply to the *unrepresented* EU citizen, but necessity (the global crisis at the outbreak of the pandemic) has overridden them, and in many cases, due to lack of capacity, represented citizens were no better off than those who, in the absence of their own, had to rely on consular protection from a foreign Member State. In this context, one of the alternatives proposed is for consular protection

⁴⁷ See: Csatlós (2019a, 102–103).

⁴⁸ As Becánics, for example, has pointed out, the protection procedure without practical arrangements in crisis situations can lead to a particularly acute problem: the uncoordinated division of tasks between Member States in terms of action and assistance results in a chaotic situation (Becánics, 2018, 163).

⁴⁹ European Commission. Consular protection - review of EU rules. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12830-Konzuli-vedelem-az-unios-szabalyok-felulvizsgalata_hu[hereinafter: Impact assessment study 2021] B. paragraph 2. cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021. A Union of vitality in a world of fragility. Brussels, 19.10.2020. COM(2020) 690 final, 6.

⁵⁰ Article 19(1)(of the Directive (EU) 2015/637.

tasks to be taken over either by joint consular units or by EU delegations themselves. A third option is to maintain the *status quo*.⁵¹

It is questionable whether, based on the lessons learned in 2020, it is rational to even consider a business-as-usual approach and not to improve cooperation, especially as the amendment would still not affect Member States' consular protection activities not covered by emergency situations. However, it is also worth pointing out that the Barnier report in 2006 had already proposed the creation of a European consular code that would explicitly regulate cooperation between the consular authorities of the Member States and between delegations. Such cooperation should also cover third countries where no Member State has consular representation. He stressed the crucial importance of establishing a set of rules in each third state, in a kind of stand-in system, to determine which Member State is responsible for which other Member States' EU citizens. He also spoke of the establishment of a common consular corps and the introduction of uniform operational rules (Barnier, 2006, 24–25; Csatlós, 2019a, 147–148). In the end, these options were rejected and, under the Treaty provisions, the delegations carry out their activities in close cooperation with the diplomatic and consular representations of the Member States⁵² and their role is complementary, rather than an alternative to the Member States' missions in the field of consular protection; this is clear from the regulations.⁵³ However, EU delegations are already required, under the provisions of Directive 2015/637, “to make general information available about the assistance that unrepresented citizens could be entitled to, particularly about agreed practical arrangements if applicable.”⁵⁴ This could even mean that delegations will refer the EU citizen to the appropriate place in light of consular protection measures and procedures, if there is an alternative.

2.4.2. Greater involvement of delegations in consular protection tasks

While there is no experience of which is the more successful option, there are several arguments in favour of joint action in crisis situations, and even of increasing the use of existing departments that can be considered common, namely delegations.⁵⁵

The intergovernmental cooperation basis should be replaced by joint action on behalf of the EU, not only in relation to the adoption of the emergency travel document, so that assistance is based on a secure legal basis not only for EU citizens, but also for accompanying (non-EU) family members, given the extension of the protected range of persons since 2018. However, consular protection may take forms such as the issuing emergency travel documents, which Member States are not in a position to grant to third-country family members. In this respect,

⁵¹ Impact Assessment 2021, Section B.2.

⁵² Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, 13–390, Article 32.

⁵³ Council Directive (EU) 2015/637, Articles 11–13. cf. European Union guidelines on the implementation of the consular Lead State concept. OJ C 317, 12.12.2008, p. 6–8, 5.2.

⁵⁴ Council Directive (EU) 2015/637 Article 11.

⁵⁵ The idea of so-called ‘Euro consulates’ was previously rejected in the 2006 Green Paper on consular protection, mainly under the influence of the large states, France, the UK and Portugal, as well as Austria and Ireland, fearing an increase in the Commission's powers of representation. Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009 Impact Assessment Brussels, 5.12.2007, SEC(2007) 1600. 14.; Fernández (2011).

the Directive also gives Member States a very wide margin of discretion as to how they implement the travel document rules,⁵⁶ again increasing the diversity of measures, even with the best of intentions. Even if full harmonisation is not possible on a substantive legal basis, the adequacy of information and the precise regulation of procedural steps between local diplomatic missions and consular posts, with set deadlines, could compensate for the differences. The assistance of delegations under the same rules would also be an important factor in reducing duplication of jurisdiction and eliminating both elements of luck and *forum shopping*. Currently, the EU citizen's choice of jurisdiction is the rule of law in the light of the presumption of good faith: the general rule is that an EU citizen can turn to the diplomatic mission or consular post of *any* EU country if he or she cannot turn to his own.⁵⁷ As for the next steps, even if all rules are taken together, there are initially several alternatives, whether a work-sharing agreement exists or not, and only in the case of issuing an emergency travel document is the path paved with predictable procedural steps and a time limit. The key lies in the proper procedural regulation of cooperation, which, even in the absence of substantive harmonisation, can establish the desirability of legality by channelling requests to the appropriate forum. However, a prerequisite for this is that, in view of the activities of the diplomatic missions and consular posts in the same third country, the conclusion of working arrangements (which, even if they exist, are not public and do not tally with the aim of eliminating information problems) should become an obligation rather than an option⁵⁸, and that flexibility should become secondary. Under the other alternative, this could be triggered by upgrading the role of EU delegations, and with this the common regulation and implementation of consular protection measures in crisis situations.

In both cases, the implementation of a general EU Code of Administrative Procedure, completely independent of consular protection, is a thought-provoking idea, as procedural guarantees for cooperation between authorities and bodies under different jurisdictions are currently missing from the Directives and entitlement is the fundamental principle of the Charter of Fundamental Rights; the question is to what extent they can be considered as directly applicable (FRA, 2020, 28 cf. 30–31) to replace a procedural code. The principle, like the general legal principles of solidarity and loyal cooperation, legal certainty and predictability, helps interpretation, but does not create powers in an organisational sense; it cannot replace precise liability rules in a way that is consistent with transparent and predictable regulation for the EU citizen.⁵⁹

2.4.3. Further regulation of the cooperation mechanism

Following the line of procedural law regulation that started with the reform of the emergency travel document, it would also be appropriate to set procedural deadlines for each procedural act in the amendment of Council Directive (EU) 2015/637, which would bring the heterogeneous national consular protection rules closer to a transparent, predictable procedure in line with European values, at least at the level of timeliness, even under normal circumstances. The Directive envisaged that “*To fill the gap caused by the absence of an embassy or consulate of the citizen's own Member State, a clear and stable set of rules needs to be laid down*”,⁶⁰ so the

⁵⁶ Council Directive (EU) 2019/997 Article 7.

⁵⁷ Council Directive (EU) 2015/637 Article 1.

⁵⁸ cf. Council Directive (EU) 2015/637 Article 7(2)-(3).

⁵⁹ On the *best-efforts* obligation, see: Klamert (2014, 33, 240–241, 242).

⁶⁰ Council Directive (EU) 2015/637 (recital 7).

objective is set: all that is missing is the development of the instrument. In any case, making procedural acts subject to a procedural time limit in all circumstances would be essential; again, not only for issuing a travel document, but also in order to ensure a reliable and predictable procedure, especially in dealing with difficulties inherent in substantive legal differences and challenges such as issues concerning family members or dual or multiple nationals. If the provisions are extended to access to the common database of visas issued by Member States, assistance could also be provided to other categories of persons lawfully residing in the EU. Not to mention the possibility of extending the use of the emergency travel document to nationals or to the territory, but the decision is currently in the hands of the Member States.⁶¹ Conversely, unified action by a common forum, such as the inclusion of mandatory referral in a directive and a division of labour between locally represented Member States, could create unity on the basis of competence. If procedural rules were to ensure that consular protection requiring a formal procedure could be accessed on the territory of all third countries in a one-stop-shop model, uncertainties (anomalies) such as the extent to which popular tourist destinations, typically tropical destinations, which are physically distant from Europe and difficult to return home from, but which are at the same time part of a Member State and therefore *de iure* are not third countries, are considered as third country territory for the exercise of EU civil rights.⁶²

Last but not least, although not a typical area, the question of remedies must also be considered in the light of the regulation of the procedure. The exercise of the right of appeal should not be hindered by the need for flexibility in dealing with emergency situations: an appropriate regulatory environment for discretionary decisions can create legality, and the key to this requires the development of procedural law in an area that is a white space for EU consular protection policy. Accessibility, speed and flexibility justify that the parallel jurisdiction of Member States' diplomatic missions and consular posts should not be abolished by a reform, at least as regards the admissibility of applications. At the same time, it would be appropriate to include delegations as potential fora and to regulate the division of labour between Member States' diplomatic missions and consular posts better, so that, if an official procedure, such as issuing a travel document, is necessary, assistance through smooth cooperation is guaranteed in all third countries. In this context, it would be appropriate to include in the Directive the working arrangement framework and the obligation to refer on the basis of this framework, clarifying the exact content of the (pro-

⁶¹ See: the Council's legislative powers and their limits: Article 23 TFEU.

⁶² Interpretation in the light of the *lex generalis* suggests that any state which is not a Member State of the EU, i.e. its relationship with the EU is neutral in this respect. A third State is any country whose nationals are not citizens of the EU within the meaning of Article 20 TFEU: EEA Member States, Switzerland, and States at any stage of the accession process, and vice versa: a territory which, although situated outside Europe, belongs to a Member State and is subject to the territorial application of the Treaties is not considered a third State. These are the outermost regions; the Overseas Countries or Territories Associated with the Union (OCT); and territories with *sui generis* status which do not fall into the first two groups. For details of these, see: Csatlós (2019a) 106–108. The outermost regions are fully covered by EU law unless otherwise specified, while the overseas countries and territories are neither part of the EU nor third states and, in practice and in the absence of specific provisions they are not covered by the general provisions of the Treaties (Kochenov, 2012, 739–740). In this context, see: Judgment of 11 February 1999, *Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV v Commission of the European Communities*, C-390/95, EU:C:1999:66, paragraph 36; Judgment of 12 February 1992, *Bernard Leplat v Territoire de la Polynésie française*, C-260/90, EU:C:1992:66, paragraph 10; Judgment of 22 November 2001, *Kingdom of the Netherlands v Council of the European Union*, C-110/97, EU:C:2001:620, paragraph 46.

cedural) obligation on the part of the national authorities. To give the EU itself, rather than the Member State, the power to issue a travel document through its delegations would require a more radical change of powers⁶³ than the possibility of taking coordination and cooperation measures.⁶⁴

As for the EU citizen's opinion, surveys in 2020 show that 9 out of 10 respondents would prefer to turn to the EU Delegation if they needed consular assistance in a third country in which their own Member State was not represented, while just under a third of respondents know what they can do if their rights as EU citizens are not respected (European Commission, 2020, 39, 48). Such a transfer of tasks and powers would, however, lead back to a regulation of procedural steps that would provide a reassuring solution, not only for the basic procedure but also for the potential remedy phase – and the related questions of jurisdiction and forum. This would entail a further Europeanisation of consular protection policy.

3. Summary

A new era of cooperation between the Member States of the European Union began when consular assistance to an unrepresented EU citizen in a third state was defined as a right and subsequently acquired a recognised fundamental rights status following the last major Treaty reform. The parallel evolution of the requirements for a multilevel administrative structure has also developed in a way that has given new meaning to cooperation. Consular relations, which were once based on purely inter-state cooperation, have now been supplemented by an official cooperation mechanism and, as the latest innovations take the form of directives, there will also be examples of inter-state cooperation being displaced by a form of cooperation with a supra-national actor. The reform of the emergency travel document is therefore in itself a significant milestone in the development of European administrative procedural law, by formulating the relationship between authorities in a predictable and transparent manner, suitable for direct effect. It will also strengthen the legal status of the EU and allow action on behalf of all EU citizens before third countries for the international acceptance of an EU travel document that will contribute to a more tangible enjoyment of this right of EU citizenship.

The Europeanisation of administration does not stop there: burdened by Brexit and through it the loss of the UK's extensive system of external representation, and in parallel the lessons of the pandemic, the Commission is advocating a new draft legislative act to strengthen collaboration further through cooperation and coordination provisions. In the light of the lessons of the recent past, the further Europeanisation of consular protection, the necessary intertwining of the direct and indirect European administrative structure and, at the same time, the development of European administrative procedural law is inevitable, since it is important to highlight and regulate those procedural acts and legal institutions which constitute the guarantees of the enforcement of fundamental rights.

⁶³ See in this context the legal basis for the *laissez-passer* that can be issued to members and staff of the EU institutions in the interest of the EU: Council Regulation (EU) No 1417/2013 of 17 December 2013 laying down the form of the *laissez-passer* issued by the European Union. OJ L 353, 28.12.2013, 26–39.

⁶⁴ cf. Article 23 TFEU.

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